

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
CASEY’S ENTERPRISES, LLC.)	
d/b/a CASEY’S GENERAL STORE # 2385)	PERMIT NO. DL1920963
302 SOUTH MAIN STREET)	
HUNTINGBURG, INDIANA 47542)	
)	
Applicant)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Casey’s Enterprises, LLC., d/b/a Casey’s General Store #2385 (“Applicant”), located at 302 S. Main St., Huntingburg, Indiana 47542, permit number DL1920963, is the applicant for a type 115 Alcohol and Tobacco Commission ("Commission" or “ATC”) permit. The application was assigned to the Dubois County Local Alcoholic Beverage Board (“Local Board”). On May 3, 2004, the Local Board heard the application request and on that same day, voted 2-2 with respect to the application. The Commission reviewed the record of the Local Board and approved the application on May 18, 2004. Carol Jochum, one of the individuals who testified before the Local Board against the Applicant, filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on July 13, 2005, and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing, the evidence submitted to the Commission, and contents of the entire Commission file, now tenders her Proposed Findings of Fact and Conclusions of Law for recommendation to the members of the Commission.

II. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board.

1. Cindy Frohbieter, Area Supervisor, Casey's General Store;
2. Carol Jochum, owner of Yogi's Liquor Store, Huntingburg;
3. Mary Ann Sutton, employee of Yogi's Liquor Store, Huntingburg;
4. Fred Haywood, Huntingburg United Methodist Church; and
5. James Petty, Central Christian Church.

B. The following exhibits were introduced before the Local Board against the Applicant:

1. Exhibit 1: letter from Mayor Gail N. Kemp, City of Huntingburg, opposing issuance of permit to the Applicant. Dated May 4, 2004;
2. Exhibit 2: letter from Reverend Gloria J. Kramer, Spirit Life Assembly of God, Huntingburg, Indiana, opposing issuance of permit to the Applicant. Dated April 29, 2004;
3. Exhibit 3: letter from Southwest Dubois Building Trades Instructor opposing issuance of permit to the Applicant. No date; and
4. Exhibit 4: letter from Indiana Association of Beverage Retailers, John Livengood, President, stating general opposition to issuance of alcohol permits to convenient stores and grocery stores. Dated August 1, 1998.

III. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission:

1. Joy Adams, Area Supervisor, Casey's General Store; and
2. Carol Jochum, owner of Yogi's Liquor Store, Huntingburg.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Applicant, Casey's Enterprises, L.L.C., d/b/a Casey's General Store #2385 ("Applicant"), located at 302 S. Main St., Huntingburg, Indiana 47542, permit number DL1920963, is the applicant for a type 115 ATC permit. (Local Board Hearing; ATC File).
2. Applicant filed with the Commission its application for a permit at this location, which was subsequently referred to the Local Board. (ATC File).
3. The permit application was properly submitted pursuant to IC 7.1-3-1-4.
4. On or about May 3, 2004, the Local Board heard the application request and on that same day, voted 2-2 with respect to the application. (ATC File; Local Board Hearing). This vote does not constitute a recommendation of the Local Board. IC 7.1-2-4-16; IC 7.1-3-19-11. Irrespective of such a vote, the Commission is authorized to act on the application. IC 7.1-3-19-

1; IC 7.1-3-19-10; *Indiana Alcoholic Beverage Comm’n v. State ex. rel. Harmon*, 379 N.E.2d 140, 142, 146-7 (Ind. 1978).

5. On or about May 18, 2004, The Commission reviewed the record of the Local Board and approved the application. (ATC File).

6. The Commission has jurisdiction over this matter pursuant to IC 7.1-1-2-2 and IC 7.1-2-3-9. The Commission is authorized to act upon proper application. *Id.*

7. The Hearing Judge took judicial notice of the entire Commission file, including but not limited to, the Local Board tapes, the Local Board file, and the ATC file. (ATC Hearing). The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

8. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. IC 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* IC 4-21.5-3-27(d).

9. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission’s rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); IC 4-21.5-3-27(d).

10. Carol Jochum appeared as a remonstrator at the appeal hearing. She is the owner of Yogi’s Liquor Store, a would-be competitor of Casey’s General Store. As such, she lacks the requisite standing to object before the Commission. *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. Ct. App. 1990). Because the only remonstrator at the appeal hearing had no standing, there were no remonstrators of record in this matter.

11. Neither the Local Board nor the Commission can deny a permit to an otherwise qualified applicant based on speculation that automobile accidents are more likely to occur in the future if alcoholic beverages are sold at a particular premises where gasoline is also being sold. (Local Board Hearing).
12. Applicant holds other grocery permits in Indiana and has had no violations with regard to sales to minors. Applicant has extensive protections and procedures in place to minimize the risk of sales of alcohol to minors. (Local Board Hearing; ATC Hearing).
13. Applicant sells items typically found in other grocery stores. (Local Board Hearing; ATC Hearing).
14. Applicant has numerous outlets in Indiana that sell warm beer and wine, and stores identical to this one have been determined as grocery stores by the Commission. (ATC Records; Local Board Hearing; ATC Hearing).
15. Competition between Applicant and an existing package liquor store played a role in the remonstrance in this case. (Local Board Hearing; ATC Hearing).
16. The Commission is statutorily charged to investigate a permit issuance in regard to its proposed geographical location; determine the need for such services at the proposed location; the desire of the neighborhood or community to receive such services; and the impact of the proposed permit location on the community and neighborhood and on area businesses. 905 IAC 1-27-4.
17. “Need” means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).
18. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
19. A determination of whether there exists a need for the permit, a desire for the services,

and to what degree of impact of such services on the neighborhood and businesses turns on the facts on each case. *Id.*

20. When an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

21. When an Applicant shows that competing stores located in close proximity to the proposed permit premises are selling alcohol, such evidence constitutes a desire to purchase the product. *Id.*

22. When remonstrators cite to the deleterious impact of alcohol in opposing a permit, it goes to the impact of such services on the neighborhood or community. 905 IAC 1-27-4(d).

23. Although the remonstrators have presented evidence to demonstrate that the community does not desire another alcohol establishment (Local Board Hearing; Remonstrator's Exhibits 1 to 3), it was not enough to overcome the substantial evidence as a whole presented by the Applicant indicating that the community does desire a convenient store that sells alcohol. (Local Board Hearing; ATC Hearing; Testimony of Frohbieter) and that the community and neighborhood would benefit from the issuance of the permit. Reasonable competition between permittees, which results in better products being delivered, better services being offered, diverse shopping environments and lower prices to consumers is good public policy, helps protect and promote economic welfare, and is not inconsistent with the Commission's purpose of, *inter alia*, regulating and limiting the manufacture, sale, possession and use of alcoholic beverages. IC 7.1-1-1.

24. Facts and substantial evidence favor supporting the granting of the permit. (ATC Hearing; Local Board Hearing; ATC File). Substantial evidence is the standard to be applied by the Commission in review of the record of proceedings. Substantial evidence requires something

more than a scintilla, and less than a preponderance of evidence; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656 (Ind. Ct. App. 1992); see also *Roberts v. County of Allen*, 773 N.E.2d 850, 853 (Ind. Ct. App. 2002). Based on the entire record, the Commission's decision to grant the Applicant's permit is based on reasonable and sound evidentiary support, and is, therefore, supported by substantial evidence. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.* 615 N.E.2d 100, 104 (Ind. Ct. App. 1993).

25. The Commission's initial action in granting the permit to the Applicant was not (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. . IC 7.1-3-19-11.

26. The Commission may grant or refuse the permit application accordingly as it deems the public interest will be served best.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the Indiana Alcohol & Tobacco Commission in granting the permit to the Applicant, Casey's Enterprises, LLC., d/b/a Casey's General Store #2385, located at 302 S. Main St., Huntingburg, Indiana 47542, permit number DL1920963, was based on substantial evidence and must be sustained. Therefore, the recommendation of the Commission in this matter is hereby UPHELD.

DATED: October 26, 2005

U-Jung Choe, Hearing Judge
Indiana Alcohol & Tobacco Commission